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order

**ORIGINAL**

(48)

4-19-02  
SC

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

ALLFIRST BANK,

Plaintiff,

v.

JOHN M. ORTENZIO,

Defendant.

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CIVIL ACTION NO. 1:01-CV-786  
(Honorable Sylvia H. Rambo)

**FILED**  
HARRISBURG, PA

APR 18 2002

MARY E. D'ANDREA, CLERK  
Per PD Deputy Clerk

**DEFENDANT'S MEMORANDUM IN OPPOSITION TO  
PLAINTIFF'S MOTION TO STRIKE JURY DEMAND**

**I. INTRODUCTION**

Defendant, John M. Ortenzio, by his undersigned counsel, opposes the plaintiff's motion to strike jury demand. In essence, as demonstrated below, the plaintiff has sued defendant for money damages in Count I, for breach of contract, an action at law and, accordingly, defendant is entitled to a jury trial. With respect to plaintiff's Count II, for equitable subrogation, which plaintiff describes as similar to unjust enrichment, plaintiff's Complaint, as a matter of law, fails to even state a cause of action, as further demonstrated below. Since, in essence, this lawsuit is one at law, defendant is entitled to a jury trial.

## II. BACKGROUND<sup>1</sup>

This lawsuit involves the interpretation of three notes: A Promissory Note that a corporation, CCI Construction Co., Inc. ("CCI") executed on March 24, 1999, pursuant to which plaintiff provided CCI a long term, unsecured \$4 million line of credit ("the line of credit"); a Commercial Loan (equipment) Note dated November 20, 1998, pursuant to which plaintiff extended a \$2 million loan to CCI, secured by CCI's equipment ("the equipment note"); and a Commercial Loan Note dated November 8, 1999, in the amount of \$1.2 million, which had been guaranteed by the defendant ("the guaranteed note").

Plaintiff contends that defendant acted unlawfully when it caused CCI to repay the guaranteed note from funds available from the line of credit.

In essence, CCI maintained a single checking account at Allfirst and all of the aforementioned loans were tied into a cash management facility (Schwartz Dep., at 85, 102-103).<sup>2</sup> More specifically, any checks written on CCI's account at Allfirst increased the balance owed on the line of credit and, conversely, all revenues deposited to CCI's account had the effect of reducing the balance and, thereby, increasing the availability of funds that could be borrowed on the line of credit (*Id.* at 142). Accordingly, when Allfirst lent CCI the sum of \$1.2 million, pursuant to the guaranteed note, it increased the availability on the \$4 million line of credit by \$1.2 million and, conversely, decreased the balance owed on the line of credit by the same amount (*Id.* at 87-88). It is also

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<sup>1</sup> Plaintiff, once again, has seen fit to set forth in its Memorandum a version of "Basic Facts" which is both disputed and irrelevant with respect to the pending Motion. Plaintiff is compelled to respond with a counter-statement of facts.

undisputed that all payments that CCI made from its checking account, such as payroll, taxes, payments to vendors and re-payments on the \$2 million equipment note were drawn from the line of credit, and thereby had the same effect of increasing the balance on the \$4 million line of credit.

According to the deposition of Craig J. Schwartz, plaintiff's loan officer, who was responsible for the loans to CCI, the \$1.2 million guaranteed note was provided at the request of CCI, on a short-term basis, when it was encountering cash flow difficulties (Id. at 56). Mr. Schwartz acknowledged in his deposition that there were no restrictions in the guaranteed note as to the source of funds that could be used to repay the note (Id. at 62). He acknowledged that the guaranteed note was short-term, temporary and, indeed, had to be repaid no later than March 31, 2000 (Id. at 57, 62). Mr. Schwartz never monitored CCI's use of the \$1.2 million guaranteed note funds (Id. at 68). He acknowledged that the plaintiff had initially contemplated increasing the \$4 million line of credit to a \$5 million line of credit, and had requested Mr. Ortenzio, the defendant, to guarantee the full \$5 million, but agreed to limit the defendant's guaranty to the \$1.2 million guaranteed note after Mr. Ortenzio refused to guarantee more than that amount. (Id. at 69).

Pursuant to the parties' agreement, the form language in the \$1.2 million guaranteed note was stricken to make it clear that defendant's guarantee would extend to the \$1.2 million guaranteed note only, and not to the \$4 million line of credit or to any

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<sup>2</sup> All references are to the deposition transcript of the plaintiff's loan officer, Craig L. Schwartz, attached hereto as Exhibit "A."

other loan facility at the plaintiff's bank (Id. at 79). Mr. Schwartz acknowledged that the plaintiff could have asked the defendant to guarantee up to \$1.2 million of any loan facility, i.e., not limit the guaranteed amount to the guaranteed note only, but failed to do so.

Mr. Schwartz acknowledged in his deposition that there were no restrictions in the guaranteed note as to the source of funds that could be used to repay the note (Id. at 62). He admitted that there was no document that deals with how the loan was to be repaid, nor was there any document that states that the \$1.2 million guaranteed note could not be repaid by writing a check on CCI's checking account, thereby drawing on the line of credit (Id. at 144). Mr. Schwartz acknowledged that the plaintiff had expected that the guaranteed note would be paid from cash flow, but admitted that the expectation is not memorialized in any document (Id. at 146). Remarkably, Mr. Schwartz acknowledged that there was absolutely no reason why the plaintiff could not have documented an express prohibition so that the \$1.2 million guaranteed note could not be repaid by drawing down on the \$4 million line of credit (Id. at 147).

In connection with the plaintiff's allegation in the Complaint at paragraph 17, Mr. Schwartz acknowledged that he was not aware of any facts which supported the plaintiff's allegation that the repayment of CCI's \$1.2 million guaranteed loan was a "conditional payment" and would not be effective until the entire \$4 million line of credit had been repaid and satisfied (Id. at 157). Mr. Schwartz was not aware of any banking practice, custom or regulation that would act as an impediment to the plaintiff stating in

any loan document that the \$1.2 million guaranteed note could not be paid off unless and until the \$4 million line of credit had been paid off first (Id. at 159).

In connection with the plaintiff's fraud count, Mr. Schwartz admitted that the defendant never made any direct representation that the \$1.2 million guarantee loan would not be paid from the \$4 million line of credit (Id. at 163). Mr. Schwartz reiterated that there was no document anywhere that prohibited repayment of the \$1.2 guaranteed note from the \$4 million line of credit (Id. at 193). He reiterated that there had been no impediment to the bank requiring the defendant to sign a document which would have prohibited the use of the line of credit to repay the \$1.2 million guaranteed note (Id. at 193). Mr. Schwartz acknowledged that there was no impediment to the plaintiff putting in any document that the loan could only be repaid from excess cash flow or excess profits (Id. at 194-195).

On February 11, 2002, approximately one month prior to the due date, CCI repaid the \$1.2 million guaranteed note by drawing on the \$4 million line of credit and, thereby, merely reversing the book-entry transaction that was made when the plaintiff had lent CCI the \$1.2 million a few months earlier. At the time, CCI owed only approximately \$1.2 million on the \$4 million line of credit, so that the total amount due after the repayment was approximately \$2.4 million (Id. at 90-91). In other words, according to Mr. Schwartz, at the time of the repayment of \$1.2 million guaranteed loan, there was a sufficient cushion under the \$4 million line of credit to repay the guaranteed note (Id. at

200-201).<sup>3</sup> Remarkably, Mr. Schwartz admitted that in hindsight, it would have been “prudent” for the plaintiff to require the defendant to execute a document that would have specifically prohibited the repayment of the \$1.2 million guaranteed note from the \$4 million line of credit (Id. at 211-212).

Unlike the \$4 million line of credit note, neither the \$1.2 million guaranteed note nor the \$2 million equipment note contained a waiver of jury trial provision. In fact, as reflected in Exhibit D of the Complaint, the plaintiff declared CCI’s default under the equipment note which contained no waiver of a right to jury trial. Moreover, there was no waiver of jury trial in the guarantee of the \$1.2 million note that the defendant had executed.

On February 24, 2000, the plaintiff declared a default under both the line of credit and the equipment note, but failed to provide CCI the 30 day notice and opportunity to cure, as required in the \$4 million note. The plaintiff immediately seized all of CCI’s assets, froze its checking account and dishonored all checks including payroll and taxes (Id. at 122, 125). CCI’s bankruptcy followed thereafter.

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<sup>3</sup> Plaintiff’s Memorandum seeks to paint defendant as an opportunist who caused CCI to pay off the guaranteed note in order to avoid personal liability in view of the severity of CCI’s financial distress, an assertion that is irrelevant in view of the documentation involved. In any event, it is worth noting that CCI’s former Chief Financial Officer, Sheri Phillips, has testified that at the same time that CCI paid off the guaranteed note, CCI had over \$6.5 million in valid claims against governmental entities (Exhibit “B”, at 97) and that CCI had, in fact, assumed and notified the plaintiff that the guaranteed note would be timely re-paid by March, 2000 (Id. at 49, 111). Ms. Phillips also testified that she had no recollection of the plaintiff ever advising CCI or the defendant that the guaranteed note could not be repaid from the line of credit (Id. at 76).

### III. ARGUMENT

#### A. **The Court Should Deny Plaintiff's Motion to Strike Jury Demand Because Actions for Money Damages for Breach of Contract are Legal in Nature and are Triable to a Jury.**

The Seventh Amendment to the United States Constitution provides "in Suits at common law, where value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. The Supreme Court of the United States interprets "suits at common law" to mean cases involving legal rights; no jury right attaches to equitable claims. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 (1989). In determining whether a claim is equitable or legal,

first, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature. The second stage of this analysis is more important than the first. If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder.

Id. at 42 (citations omitted); see also Simler v. Conner, 372 U.S. 221, 222 (1963) ("the right to a jury trial in the federal courts is to be determined as a matter of federal law. . . . The federal policy favoring jury trials is of historic and continuing strength."); Thermo-Stitch, Inc. v. Chemic-Cord Processing Corp., 294 F.2d 486, 490-491 (5th Cir. 1961) ("The mere presence of an equitable cause furnishes no justification for depriving a party to a legal action of his right to a jury trial.").

The gist of the action here is set forth in Count I of the Complaint, which sets forth a claim for money damages for breach of contract. An action for money damages based

on a breach of contract is traditionally a legal claim. See Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (holding that because the complaint did contain a legal claim for breach of contract, the plaintiff was entitled to a jury trial on his legal claims). In Dairy Queen, the Supreme Court stated succinctly:

As an action on a debt allegedly due under a contract, it would be difficult to conceive of an action of a more traditionally legal character.

Id. at 477, citing Scott v. Neely, 140 U.S. 106, 110 ("In the case before us the debt due the complainants was in no respect different from any other debt upon contract; it was the subject of a legal action only, in which the defendants were entitled to a jury trial in the Federal courts."). Moreover, a leading treatise on the federal rules of civil practice explains that "actions for money damages for breach of contract are legal in nature and are triable to a jury." See Moore's Federal Practice 3d § 38.30[3].

In this case, paragraph 29 of the plaintiff's Complaint alleges:

Because the One Million Two Hundred Thousand Dollar loan from Allfirst to CCI was never paid or discharged in full, the obligation of Ortenzio, as guarantor and surety and co-obligor with respect to the One Million Two Hundred Thousand Dollar loan and the Commercial Note, was never discharged or satisfied, such that Ortenzio remains liable under the Suretyship Agreement for all sums owed by CCI pursuant to the One Million Two Hundred Thousand Dollar loan and the Commercial Note.

See Complaint at ¶ 29. In addition, the Complaint plainly seeks money damages, to which defendant is entitled to demand a jury:

The amount owed by Ortenzio pursuant to the Suretyship Agreement equals the lesser of (a) the unpaid balance of all principal and interest owed on the Commercial Note as

though the February 12, 2000 payment has not been made or (b) the greater of (i) the unpaid principal balance and all accrued interest due under the revolving line of credit, together with all collection costs and attorneys fees, or (b) the unpaid principal balance and all accrued interest due under the revolving line of credit, together with all collection costs and attorneys fees, plus the amount of any recovery made by CCI in the preference action pending in the bankruptcy case, together with, in either case (a) or (b), all attorneys fees and collection costs in enforcing the Suretyship Agreement as provided therein.

Id. at ¶ 30; see Curtis v. Loether, 415 U.S. 189, 196 (1974) (nature of the remedy is the more important element of the analysis). As plaintiff's first cause of action states a claim for breach of contract for which Plaintiff seeks money damages, defendant is entitled to the jury trial he has demanded.<sup>4</sup>

Similarly, Count III states a claim for fraud, which also seeks money damages. See Complaint at ¶ 34. Actions sounding in tort "for damages to a person or property" are also generally considered to be actions at law. See Ross v. Bernhard, 396 U.S. 531, 533 (1970). Fraud claims routinely are permitted to go to a jury. For example, in Butler v. Consolidated Drake Press, 1995 U.S. Dist. LEXIS 2049, \*6 (E.D. Pa. Feb. 22, 1995), Judge Rendell denied a motion to strike a jury demand on a claim of fraud. A leading treatise is in agreement: "In fraud actions in which monetary damages are sought, a right to jury trial may be asserted." See Moore's Federal Practice 3d § 38.30[1][e][ii].

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<sup>4</sup> Plaintiff argues that "where the claim for a monetary award is intertwined with a primary request for equitable relief, the action is equitable and does not require a jury." See Plaintiff's Mem. at 8. This argument is misleading. The only relief sought by plaintiff in its prayer for relief is: 1) compensatory damages; 2) punitive damages; 3) an award of costs. See Complaint, Prayer for Relief.

Because defendant is entitled to a trial by jury on the legal claims and remedies set forth in plaintiff's Complaint, plaintiff's motion to strike defendant's demand for a jury must be denied.

**B. Because Plaintiff's Complaint is Essentially Based on an Alleged Breach of Contract, Plaintiff is Not Entitled to the Equitable Remedy of "Equitable Subrogation".**

Count II purports to state a claim for "equitable subrogation" against Ortenzio, but fails to do so. In plaintiff's memorandum of law in support of its motion to strike defendant's jury demand, plaintiff writes that "the basis of equitable subrogation is the equitable concept of unjust enrichment." See Plaintiff's Mem. at 9.

However, Count I of the Complaint alleges that numerous contracts existed between the bank and Ortenzio, which Ortenzio allegedly breached. Complaint, ¶¶ 25-30. In other words, plaintiff has sued Ortenzio on both a breach of contract theory and a theory of equitable subrogation / quantum meruit, which is not proper. Quantum meruit is "an implied contract remedy based on payment for services rendered and on prevention of unjust enrichment." Aloe Coal Co. v Department of Transp., 164 Pa. Commw. 453, 643 A.2d 757, 767 (1994). A "promise to pay for services may only be implied when such services are rendered in such circumstances where the performing party entertains a reasonable expectation of being paid by the party benefited." Id., citing Martin v. Little, Brown and Co., 304 Pa. Super. 424, 450 A.2d 984 (1981). As a general principle, if one obtains the money or property of another without authority, the law, independently of an express contract, will compel restitution or compensation. Am. Jur 2d, Restitution and

Implied Contracts §1; Stand. Pa. Pract. § 22:5. Thus, where no proper contract exists, express or implied, a contract may be implied in law.

However, it is well-settled under Pennsylvania law that a claim for quantum meruit will not lie against a defendant who is also claimed to be a party to a contract. Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. 1999) (a court may not make a finding of unjust enrichment where a written or express contract exists). See also Birchwood Lakes Community Ass'n v. Com., 296 Pa. Super. 77, 442 A.2d 304, 308 (1982) (a plaintiff cannot recover on a claim for unjust enrichment if such a claim is based on a breach of a written contract); Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987) (same).

In this case, the Complaint purports to assert a claim against Ortenzio on a theory of quantum meruit. Quantum meruit supplies a remedy where the plaintiff alleges that, although there was no direct promise to pay, a promise should be implied because the defendant sought and received a benefit, it would be unjust to retain that benefit, and wherein there is no other party said to be liable. Here, however, there is a contract and it is attached to plaintiff's Complaint. It provides a contractual remedy to plaintiff. Nonetheless, plaintiff sued Ortenzio, hoping to imply the equitable remedy of quantum meruit in circumstances where the law will not permit it to do. See Mitchell v. Moore, supra (court "may not make a finding of unjust enrichment... where a written or express contract between the parties exists."). Accordingly, where there is alleged to be a contract, a cause of action for quantum meruit against some other party, may not lie and should be dismissed. Id. ("Where parties without any fraud or mistake, have deliberately

put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement.”).

Plaintiff’s motion to strike defendant’s jury demand must be denied because the Complaint does not even properly set forth an equitable claim. The Complaint fails to state a claim for equitable subrogation / quantum meruit against Ortenzio because equity will not imply a cause of action for equitable subrogation / quantum meruit where, as here, a claim for breach of contract is also said to exist.

**C. Contrary to Arguments Made in its Memorandum in Support of Its Motion to Strike the Jury Demand, Plaintiff Has Not Stated a Claim for Rescission.**

In plaintiff’s memorandum in support of its motion to strike jury demand, plaintiff argues that “suits where the essential nature of the remedy sought is that of recision [sic] or restitution are equitable and do not carry the right to trial by jury.” See Plaintiff’s Mem., at 7. Under Pennsylvania law, a rescission amounts to the unmaking of a contract. Rescission is the “unmaking of a contract, and is not merely a termination of the rights and obligations of the parties towards each other, but is an abrogation of all rights and responsibilities of the parties towards each other from the inception of the contract.” Metropolitan Property and Liability Insurance Co. v. Commonwealth of Pennsylvania, 509 A.2d 1346, 1348 (Pa. Commw. 1986), aff’d, 535 A.2d 588 (Pa. 1987).

Plaintiff’s argument fails for several reasons. First, plaintiff’s Complaint does not even mention the word rescission. Second, even if plaintiff now asserts that it somehow stated a claim for rescission, such a claim would fail and must be dismissed.

It is axiomatic that not every breach of a contract justifies rescission. See Castle v. Cohen, 676 F. Supp. 620, 627 (E.D. Pa. 1987) (emphasis added), aff'd in relevant part, 840 F.2d 173 (3d Cir. 1988). The Castle case involved complex litigation related to an employee stock option plan of certain hospitals, subsequent to the plea of guilt to Medicare fraud by the majority stockholders. Id. at 622. In order to assure that the hospitals would still be entitled to Medicare reimbursements, the majority shareholders agreed to sell their majority stake at fair market value after an independent appraisal process, to either the trustees or to a third-party as set forth in an agreement. Id. at 623. The trustees had a right of first refusal. After the majority shareholders attempted to sell their shares to a third party, rather than the trustees of the plan, the trustees sued the majority stockholders alleging a breach of the stock purchase agreement, as well as violations of ERISA and securities law. The court found that the defendants were essentially asking the court to rescind the stock purchase agreement. Id. at 627. The court noted that the "essence of their agreement was that the stock would change hands at fair market value." Id. A jury determined the fair market value by evaluating the competing appraisals. The Castle court wrote that the rescission sought by the defendants "is appropriate only under extraordinary circumstances when the complaining party has suffered a breach of such a fundamental and material nature that it affects the very essence of the contract and serves to defeat the object of the parties." Id. (emphasis added). The court decided that "the contract between the parties is enforceable in every respect." Id.

Such “extraordinary circumstances” are generally only found to be present after a finding of “a total failure in the performance of the contract.” See Nolan v. Williamson Music, Inc., 300 F. Supp. 1311, 1317 (S.D.N.Y. 1969). The Nolan court cited an example where the plaintiff temporarily turned over to the defendant prints from which movies were to be made and then distributed. The contract provided that the defendant was to render weekly accounts of the earnings on the movies and to pay the plaintiff fifty percent thereof. The prints were to be returned at the expiration of the contract term. The court found that the defendant never paid plaintiff the full amount due, deliberately maintained a set of fictitious records, deliberately rendered false accountings, refused to permit inspection of the records as was required by the contract, and failed to return the prints to the plaintiff. Under these factors, the court held that rescission was appropriate.

Applying Castle, Nolan, and the cases cited therein, plaintiff’s Complaint sets forth nothing more than allegations of a simple breach of contract – a claim that is triable before a jury -- and nothing that would be considered “extraordinary circumstances” that affects the “very essence of the contract” as is required for a court to rescind the terms of the agreement. Castle, 676 F. Supp. at 627. Plaintiff does not allege that Ortenzio engaged in “a total failure in the performance of the contract.” Nolan, 300 F. Supp. at 1317. In fact, plaintiff avers just the opposite -- that Ortenzio executed numerous notes and agreements and proceeded to draw upon the line of credit extended by the plaintiff. See Complaint, at ¶¶ 10-14. There is nothing in the Complaint that alleges the “extraordinary circumstances” that a claimant must plead in order to demonstrate that the other party failed to totally perform under the agreement. Cohen, supra; Nolan, supra.

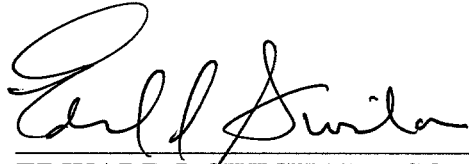
Accordingly, any argument that plaintiff raises that seeks to rescind any of the contracts must be rejected, and all such claims of a simple breach of contract must be tried before a jury.

**IV. CONCLUSION**

For the above reasons, Defendant John M. Ortenzio, respectfully requests that this Honorable Court deny Plaintiff's Motion to Strike Jury Demand.

Respectfully submitted,

BLANK ROME COMISKY & McCAULEY LLP

BY:   
EDWARD I. SWICHAR, ESQUIRE  
One Logan Square  
Philadelphia, PA 19103  
(215) 569-5500

Attorneys for Defendant, John M. Ortenzio

Dated: April 17, 2002

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Defendant's Memorandum in Opposition to Motion to Strike Jury Demand was served this 17<sup>th</sup> day of April, 2002, by first class mail, postage prepaid, upon the following:

Lawrence J. Gebhardt, Esquire  
Gebhardt & Smith LLP  
The World Trade Center, 9<sup>th</sup> Floor  
Baltimore, MD, 21202  
*Attorneys for Plaintiff*

A handwritten signature in black ink, appearing to read "Ed I. Swichar", written in a cursive style.

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EDWARD I. SWICHAR, ESQUIRE

Craig J. Schwartz

Exhibit A

Page 1

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

3 ALLFIRST BANK :

4 Plaintiff :

5 v. : CA NO. 1:CV-01-0786

6 JOHN M. ORTENZIO :

7 Defendant : Pages 1 - 216

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12 Deposition of Craig J. Schwartz

13 Baltimore, Maryland

14 Friday, February 15, 2002

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21 Reported by: Kathleen R. Turk, RPR-RMR

**Craig J. Schwartz**

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1 Q Well, I'm trying to give you examples of the  
2 information I'm looking for.

3 How did this note come about?

4 A There was a request made from CCI of  
5 additional funds.

6 Q By whom?

7 A Either Sheri Phillips or Mr. Ortenzio.

8 Q Do you recall specifically which person?

9 A No, specifically.

10 Q And do you recall either of those persons  
11 telling you why they required the 1.2 million  
12 dollar --

13 A Yes.

14 Q -- advance or facility?

15 What did that person tell you?

16 A There was a current cash flow shortage of  
17 the company, and additional funds were required to  
18 continue operation.

19 Q You don't remember who told you that?

20 A I believe it was in a meeting, and  
21 Mr. Ortenzio and Sheri Phillips were both there.

**Craig J. Schwartz**

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1 Q Was there any discussion whether this was  
2 going to be a short-term or a long-term facility?

3 A Short-term, I believe.

4 Q What is short-term in relation to long-term?  
5 Make sure we're on the same wavelength.

6 A Short-term would be less than a year.

7 Q Okay. Were any documents presented to you  
8 by CCI in connection with your granting the 1.2  
9 million dollar loan facility?

10 A Yes, I believe they were.

11 Q What documents were provided to you and  
12 relied upon?

13 A I don't specifically recall exactly what  
14 documents were, were given.

15 Q No -- no general idea as to what documents  
16 were provided?

17 A Financial statements, current financial  
18 statements of the customer.

19 There may have been others.

20 Q Do you recall that, or are you just assuming  
21 it?

**Craig J. Schwartz**

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1 A Yes.

2 Q Okay. Was there any restriction with  
3 respect to the 1.2 million dollar note as to the  
4 source of funds that could be used to repay the note?

5 A The note should have been repaid -- okay,  
6 ask the question -- what was the question?

7 Q Is there any restriction in the note in  
8 regard to the source of funds that could be used to  
9 repay the note?

10 A Not in the note.

11 Q I understand, I'm only sticking to the note.

12 A Not in the note.

13 Q Okay. Now, we'll come back to that because  
14 I know you're anxious to say something.

15 Let's look at Schwartz 5.

16 This Schwartz 5, this is your memo; is that  
17 correct?

18 A Yes.

19 Q And it says that we decided that an increase  
20 of 1.2 million will be done on a temporary basis and  
21 CCI will get an additional five hundred thousand from

**Craig J. Schwartz**

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1 that.

2 Did you ever monitor CCI's use of the  
3 1.2 million dollar loan funds?

4 A No.

5 Q I show you what has been marked for  
6 identification as Exhibit Schwartz 6.

7 A Okay.

8 Q Do you recall how this document came about?  
9 Was it prepared by you?

10 A Yes.

11 Q How did it come about?

12 Why was this document prepared?

13 A This was a result of a meeting with CCI,  
14 that they were going to need additional funds because  
15 of cash flow shortages.

16 Q Was this -- was this S-6 preceded by the  
17 1.2 million dollar note, which is dated six days  
18 later?

19 A Yes.

20 Q Okay. Was it initially contemplated by the  
21 bank that the four million dollar line of credit would

**Craig J. Schwartz**

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1 A Yes.

2 Q Okay. Tell me from a banker's perspective,  
3 if you turn to Page 2, there's an asterisk in the  
4 second paragraph, then it goes on to say under the  
5 twelve -- 1.2 million dollar commercial loan note.

6 What does that change reflect from your  
7 perspective?

8 A That the surety applies to the million two  
9 note.

10 Q And it doesn't apply to any other liability  
11 of CCI?

12 A That appears to be correct.

13 Q Okay. So the initial form, if signed by  
14 Mr. Ortenzio, would have been a guarantee of not only  
15 the 1.2 million, but of the four million as well as  
16 any other loan facility; is that correct?

17 A Yes.

18 Q And the 1.2 million dollar note was  
19 modified -- guarantee -- was modified, or a suretyship  
20 was modified to make it understood that the guarantee  
21 would only extend to the 1.2 million dollar facility;

**Craig J. Schwartz**

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1 principal or interest, that would be from the checking  
2 account, right?

3 That -- CCI's checking account at the bank?

4 A Yes.

5 Q Okay. And that -- it's the same checking  
6 account that was tied into the cash management  
7 facility and the four million dollar line of credit?

8 A I would think so.

9 Q All right. So if CCI made a repayment on  
10 account of the equipment note, principal or interest,  
11 that would have the impact of drawing down on the line  
12 of credit, wouldn't it?

13 A Possibly.

14 Q Possibly?

15 You mean sometimes it's possible, sometimes  
16 it's not, depending on when it's hit, or what?

17 A No, you are correct; it would have the  
18 impact of drawing down the line of credit, yes.

19 Q Okay. And it would reduce availability on  
20 the line of credit; is that correct?

21 A Yes, that's correct.

**Craig J. Schwartz**

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1 front of you.

2 MR. GEBHARDT: Do I have that?

3 MR. SWICHAR: Oh, I'm sorry; no, I

4 don't think you do.

5 (Document was handed to counsel.)

6 Q (By Mr. Swichar) This basically -- is S-8  
7 basically the commitment letter for the 1.2 million?

8 A Yes.

9 Q Now, the 1.2 million was fully advanced at  
10 its inception?

11 A Yes.

12 Q Okay. And was it deposited to CCI's  
13 checking account at Allfirst Bank?

14 A Yes.

15 Q Okay. And when the 1.2 million was  
16 deposited in CCI's checking account, again, that's the  
17 same checking account that's tied in to the cash  
18 management facility and the four million dollar line  
19 of credit; is that correct?

20 A Yes.

21 Q Okay. Now, when the 1.2 million dollar line

**Craig J. Schwartz**

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1 of -- when the 1.2 million dollar loan was deposited  
2 into CCI's checking account, that would have increased  
3 the borrowing capacity on the four million dollar line  
4 of credit; is that correct?

5 A It would have the effect of paying any  
6 principal outstanding back on the four million dollar  
7 facility.

8 Q Okay. So put another way, when the 1.2  
9 million dollar deposit was made in the CCI bank  
10 account that was tied in to the four million dollar  
11 line of credit, it would have had the effect of  
12 decreasing the loan balance owed on the four million  
13 dollar line of credit by 1.2 million dollars?

14 A Yes.

15 Q Okay. Let me show you what has been marked  
16 for identification as Exhibit Schwartz 9, the document  
17 that was furnished by the bank.

18 Do you know whose handwriting is at the  
19 bottom of S-9, whose notes?

20 A No, I do not.

21 Q Okay. Is this a type of document that

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1           MR. GEBHARDT: I mean, let me pose an  
2   objection.

3           You're confusing checks that come from  
4   customers that are deposited in the account with  
5   checks that CCI might write from its account in  
6   payment of some bill.

7       Q   Okay. CCI writes a check out of its  
8   checking account in payment of -- as a repayment of  
9   the equipment note.

10       Does that happen?

11       A   Yes.

12       Q   Okay. And that bank -- that check is  
13   written to the bank, correct?

14       A   Yes.

15       Q   And it will say on it in repayment of  
16   equipment note, correct?

17       A   Something to that effect.

18       Q   Okay. Now, when that check is presented and  
19   paid to the bank, it has the same effect of drawing --  
20   it draws a corresponding amount on the four million  
21   dollar line of credit?

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1 A Yes.

2 Q Okay. Do you have any -- does the bank have  
3 any document similar to S-9 that would relate to the  
4 deposit made by the bank of the initial 1.2 million  
5 dollar note proceeds?

6 A Yes.

7 MR. SWICHAR: Can I request that,  
8 please?

9 MR. GEBHARDT: You should have it.

10 MR. SWICHAR: I don't have it. I  
11 don't.

12 All I have -- off the record.

13 (Discussion off the record.)

14 Q (By Mr. Swichar) Mr. Schwartz, can you tell  
15 from that document the entry that deals with the  
16 deposit of the 1.2 million in November of '99?

17 A This is going to take some time.

18 MR. GEBHARDT: Let me just say for the  
19 record, my understanding is that if the 1.2 million  
20 was deposited on November 9, if that's the actual date  
21 of the disbursement, if there were other checks that

**Craig J. Schwartz**

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1           Were you requested to do anything, or did  
2   you do anything on your own?

3       A   Not that I can recall.

4       Q   At the meeting, do you recall Mr. Ortenzio  
5   being requested to guarantee all or part of the four  
6   million dollar note?

7       A   I do not recall.

8       Q   Either way?

9       A   Either way.

10      Q   Do you recall Mr. Ortenzio requesting the  
11   bank to be patient while it meets -- while CCI meets  
12   with its bonding companies?

13      A   I don't recall.

14      Q   Did Mr. Ortenzio on behalf of CCI request  
15   any additional monies from the bank at that meeting?

16      A   I don't recall.

17      Q   Now, in relation to that meeting, which  
18   we'll say was February 18th, a Friday, do you recall  
19   when the bank froze CCI's accounts?

20      A   I believe it was the next -- during the next  
21   week. I --

**Craig J. Schwartz**

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1 document that I could find or interpret that would  
2 tell me that date. And if there is such a document, I  
3 would ask that the bank interpret it for me and just  
4 call it to my attention.

5 The alternative is to take all thousand  
6 documents and go page by page, which I don't want to  
7 do. I assume there's --

8 MR. GEBHARDT: You might take a  
9 thousand documents. If something -- I mean, my  
10 understanding is that on the Wednesday prior to the  
11 declaration of default, the credit line was cut off,  
12 and there are some internal memoranda telling people  
13 to not honor the checks, and so you have copies of  
14 those.

15 MR. SWICHAR: What day -- I'm not  
16 questioning you, but if you will help me out, because  
17 I know you want to -- what was the date when the  
18 declaration -- what was the day of the declaration of  
19 default, the 24th?

20 MR. GEBHARDT: The 24th, a Thursday.

21 MR. SWICHAR: Thursday.

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1 Do you have that there, S-2?

2 Just -- did you review this Complaint before  
3 it was filed?

4 A I'm not sure. I don't recall if I did or if  
5 I didn't.

6 Q Did you review it in connection with this  
7 deposition?

8 A Yes.

9 Q Okay. Would you look at -- just so I can  
10 clarify things again -- would you look at  
11 Paragraph 7?

12 And, again, my question is, just so I  
13 understand the mechanism of the cash management  
14 facility, that any checks written from CCI's account  
15 with the bank would increase the four million dollar  
16 line of credit borrowings; is that correct?

17 A Yes.

18 Q And so far as you know, CCI had no business  
19 accounts elsewhere?

20 A As far as I know, they did not.

21 Q Okay. If -- if CCI wanted to pay a bill

**Craig J. Schwartz**

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1 And if there is, we'll find it.

2 MR. GEBHARDT: You've been provided it.

3 MR. SWICHAR: Pardon me?

4 MR. GEBHARDT: You've been provided it.

5 A I believe it states what the line of credit  
6 can be used for, and that is not a use of a line of  
7 credit.

8 Q (By Mr. Swichar) All right. Is there any  
9 document that deals with how the, how the loan is to  
10 be repaid specifically?

11 A No.

12 Q Okay. Is there any document that  
13 specifically states it cannot be repaid by writing a  
14 check on CCI's business account, checking account?

15 THE WITNESS: Could you read that back?

16 (Question was read by the Reporter.)

17 A Not specifically.

18 Q (By Mr. Swichar) Okay. Now, the loan  
19 commitment, which I think you've been chomping at the  
20 bit to want to tell me, states that the loan proceeds  
21 were to be used to finance accounts receivable and

**Craig J. Schwartz**

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1 MR. GEBHARDT: Objection.

2 Q You can answer it.

3 THE WITNESS: Would you read that back,  
4 please?

5 (Question was read by the Reporter.)

6 A It was a -- the loan amount for 1.2 million  
7 dollars was for a cash flow shortage situation that  
8 was occurring --

9 Q (By Mr. Swichar) I understand.

10 A -- so -- and, also, the line was there to  
11 finance the receivables and work in process.

12 So the 1.2 million dollars would normally be  
13 paid back after there's no usage on the line because  
14 the receivables had been collected and cash flow is  
15 sufficient to pay back the 1.2 million dollars over  
16 and above the line balance.

17 Q Where does it say that, other than in your  
18 head?

19 A It's -- it doesn't say that anywhere.

20 Q Okay. So let's go back and ask the same  
21 question. I'll say it a little slower this time.

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1           Are you aware of any reason why the bank  
2   couldn't put in the commitment letter for the  
3   1.2 million or in the 1.2 million dollar note or  
4   in the 1.2 million dollar suretyship an express  
5   prohibition that that facility could not be repaid by  
6   drawing down on the four million dollar line of  
7   credit?

8       A   There's no reason the bank could not have  
9   done that.

10      Q   In fact, the loan commitment contains  
11   negative covenants; is that right?

12      A   I believe so.

13      Q   And what's a negative covenant?

14      A   Things that the borrower is not allowed to  
15   do.

16      Q   And the loan commitment and/or the note  
17   contains loan -- negative covenants, correct?

18      A   Yes.

19      Q   Okay. And the bank could have put in a  
20   negative covenant that prohibited the repayment of the  
21   1.2 million from the four million dollar line of

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1 question; save time.

2 Q (By Mr. Swichar) Are you aware of any facts  
3 that made the payment conditional as alleged in  
4 Paragraph 7?

5 A No.

6 Q Am I correct, sir, that both the 1.2 million  
7 dollar note and the four million dollar note and the  
8 1.2 million dollar surety have default provisions?

9 A Yes.

10 Q In any of those three documents, and  
11 including the loan commitment letter, is there any  
12 prohibition, or does it make an event of default by  
13 paying the 1.2 million dollar loan off by utilizing  
14 the four million dollar line of credit?

15 MR. GEBHARDT: Objection to the use of  
16 the compound question.

17 Prohibition and event of default,  
18 they're two separate --

19 MR. SWICHAR: I'll strike the  
20 prohibition.

21 Q (By Mr. Swichar) In any of those documents,

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1 dollar note cannot be paid off unless the four million

2 dollar note is paid off first?

3 A No.

4 Q Are you aware of any banking practice,

5 custom, or regulation that would act as an impediment

6 to the bank stating in any loan document that the

7 1.2 million dollar note could not be paid off until --

8 unless and until the four million dollar note is paid

9 off first?

10 A I am not aware of any.

11 Q Are you aware of any banking practice, rule,

12 or regulation or other impediment that would have

13 prohibited the bank from requiring a guarantee of the

14 last one million dollars in CCI's indebtedness,

15 whether it be the four million dollar line or the

16 1.2 million dollar note, or the two million dollar

17 equipment loan?

18 A I am not aware of any.

19 Q Are you aware of any banking regulation,

20 policy, or rule or regulation or other impediment

21 which would have prevented the bank from stating that

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1 MR. SWICHAR: How do I have them?

2 MR. GEBHARDT: Because you have with  
3 Mr. Chemicoff, the same way --

4 MR. SWICHAR: I'm assuming that they're  
5 out there somewhere. I just wanted to make sure if  
6 there's anything else other than the checking account  
7 statements.

8 Q (By Mr. Swichar) Would you look at  
9 Paragraph 34 of the Complaint?

10 Let me know when you're done reading it.

11 (Witness reading.)

12 A Okay.

13 Q Did Mr. Ortenzio ever make any direct  
14 representation to you that the 1.2 million dollar loan  
15 facility would not be paid from the four million  
16 dollar line of credit, it would come from other funds?

17 A No.

18 Q Are you familiar with the practice --

19 MR. SWICHAR: Let's stop for a minute.

20 (Discussion off the record.)

21 Q (By Mr. Swichar) Are you familiar in reading

**Craig J. Schwartz**

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1 A Yes.

2 Q Is there any document anywhere in this world  
3 that states specifically in regard to repayment in  
4 contrast to use of the funds that the funds -- that  
5 the four million dollar line could not be used to  
6 repay the 1.2?

7 A There's no documents that says it cannot be  
8 used to repay it.

9 Q Is there any -- would there have been any  
10 impediment that you're aware of to the bank stating in  
11 any document binding on Mr. -- binding on CCI or  
12 Mr. Ortenzio to prohibit the four million dollar line  
13 of credit to be used to repay the 1.2 million dollar  
14 loan, such as we discussed earlier, a negative  
15 covenant?

16 A Other than the agreed-upon use of proceeds  
17 of that four million dollar loan.

18 Q Right, right.

19 Is there any impediment to the bank  
20 expressly stating as a negative covenant that the four  
21 million dollar line of credit could not used to repay

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1 A Okay.

2 Q Is that correct?

3 A That was --

4 Q You said they would need the money, the  
5 extra money, the 1.2 million, through the end of  
6 February, 2000.

7 A That was according to the cash flow  
8 statements.

9 Q And that's what Mr. Ortenzio told you,  
10 right?

11 A Yes.

12 Q Okay. Now, at the time of the repayment of  
13 the 1.2 million coincidently in February, 2000, the  
14 balance on the four million dollar line of credit  
15 allowed for the repayment of the 1.2 from the four  
16 million; is that correct?

17 MR. GEBHARDT: Objection.

18 Q There was sufficient cushion there under the  
19 four million dollar line of credit to repay the 1.2;  
20 is that correct?

21 We went over the numbers.

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1 A Yes.

2 Q If you want, we can do it again.

3 Am I correct?

4 A Yes.

5 Q There was sufficient money, substantially --

6 A There was availability on the line of  
7 credit.

8 Q Yes.

9 And how much was that availability?

10 It was greater than the 1.2 million, wasn't  
11 it?

12 A Yes.

13 Q We went over the numbers earlier.

14 It was more than the 1.2 million; is that  
15 correct?

16 A Yes.

17 Q Okay. You expected excess cash flow to  
18 repay the 1.2 million dollar note; is that what you  
19 said earlier?

20 A Yes.

21 Q Is that documented in any document signed by

**Craig J. Schwartz**

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1 known that Mr. Ortenzio -- that CCI would have repaid  
2 the 1.2 million dollar note out of the four million  
3 dollar line of credit, you would not have recommended  
4 approval of the note; is that correct?

5       Isn't that what you just said?

6       A Yes, yes.

7       Q Now, if you had known, looking back in  
8 hindsight, that Mr. Ortenzio or Mr. -- or CCI would  
9 have repaid the 1.2 million from the four million  
10 dollar line of credit, would you have made an express  
11 prohibition in the 1.2 million dollar note expressly  
12 prohibiting CCI from repaying the 1.2 from the four  
13 million dollar line of credit?

14       Would you have included an express  
15 prohibition of that conduct?

16       MR. GEBHARDT: Objection.

17       A It's possible.

18       Q Would that have been the prudent thing to do  
19 in hindsight to go back and say let's prevent this  
20 from occurring by specifically prohibiting a repayment  
21 of the 1.2 from the four million dollar line of

**Craig J. Schwartz**

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1 credit, as a prudent banker?

2 A Yes.

3 MR. SWICHAR: No further questions.

4 MR. GEBHARDT: We're done.

5 (Thereupon, at 2:56 p.m., the  
6 examination of the witness was concluded.)

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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ALLFIRST BANK,  
PLAINTIFF  
VS  
JOHN M. ORTENZIO,  
DEFENDANT

NO: 1:01-CV-786

DEPOSITION OF: SHERI PHILLIPS  
TAKEN BY: PLAINTIFF  
BEFORE: HILLARY M. HAZLETT, REPORTER  
NOTARY PUBLIC  
DATE: MARCH 13, 2002, 10:43 A.M.  
PLACE: ALLFIRST BANK BUILDING  
213 MARKET STREET  
14TH FLOOR  
HARRISBURG, PENNSYLVANIA

## APPEARANCES:

GEBHARDT & SMITH  
BY: LAWRENCE J. GEBHARDT, ESQUIRE

FOR - PLAINTIFF

BLANK, ROME, COMISKY & MCCAULEY, LLP  
BY: EDWARD I. SWICHAR, ESQUIRE

FOR - DEFENDANT

HARTMAN, OSBORNE & JOYCE, P.C.  
BY: MELINDA S. JOYCE, ESQUIRE

FOR - SHERI PHILLIPS

## ALSO PRESENT:

JAMIN M. GIBSON  
JOHN M. ORTENZIO

Exhibit B<sup>3</sup>

## STIPULATION

It is hereby stipulated by and between counsel for the respective parties that reading, signing, sealing, and certification are waived; and that all objections except as to the form of the question are reserved to the time of the trial.

SHERI PHILLIPS, called as a witness, being duly sworn, testified as follows:

## DIRECT EXAMINATION

BY MR. GEBHARDT:

Q Would you let us know first your residence and then your business addresses?

A Residence is 2837 North Front Street, Suite 302, Harrisburg, PA 17110.

Q And your business address?

A 515 North Office Building, Harrisburg, PA 17125.

Q And where are you presently employed?

A Commonwealth of Pennsylvania.

Q And what do you do for the Commonwealth of Pennsylvania?

A I'm the Deputy Secretary of Administration

## I N D E X

## WITNESS

FOR PLAINTIFF	DIRECT	CROSS	REDIRECT	RE CROSS
Sheri Phillips	3	60	101	111

## EXHIBITS

DEPOSITION EXHIBIT NO.	MARKED
1 - 3/23/1999 Letter	12
2 - Film/cash Solutions	13
3 - Audit Report	21
4 - 10/26/1999 Inter-office Memorandum	24
5 - 11/4/1999 Inter-office Memorandum	25
6 - 11/5/1999 Letter	31
7 - Commercial Loan Note	32
8 - Income Statement	40
9 - Balance Sheet	40
10 - Cash Flow Projections	49

1 and General Services.

Q How long have you had that position?

A Since July.

Q Prior to that time, where did you work?

A I did consulting for one company, and I also worked with another company that was part-time that I had helped start.

Q And at some point in time, you worked for a company known as CCI Construction?

A That's correct.

Q And when did you leave CCI?

A It was -- I think my last day was around May 5th, 2000.

Q And when did you begin working for CCI?

A In September of 1991.

Q Would you relate for me just briefly what your positions with CCI were from September 1991 through the date you left in terms of a job description and just a brief outline of what your duties were?

A When I started, I worked for Dave Barber and I was the controller. I think that was my title. My titles changed kind of in between there. I was responsible for the accounting, and I reported to Dave. I think his title was chief financier at the

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1 our record, that we had a project here that if we did  
2 not complete it, it would hinder us in getting future  
3 projects.

4 We had made the decision to go forward, and  
5 that decision cost us a lot of money that we did not  
6 get paid.

7 Q Did you believe the \$4 million claim to be  
8 a valid claim with respect to Scott Air Force Base?

9 A Yes, I did.

10 Q And did you believe -- strike that.

11 You're familiar to a certain extent with  
12 the Albemarle Prison claim of \$2 and a half million?

13 A I'm familiar there was a claim, yes.

14 Q Did you believe that to be a valid claim of  
15 CCI?

16 A Yes. From everything our chief operating  
17 officer told me, I would say yes.

18 Q And is it fair to say that as of February  
19 18th, 2000, you believed to the extent you could from  
20 information you had obtained that such claims were  
21 valid, the Scott Air Force Base and the Albemarle  
22 Prison claim?

23 A Yes.

24 Q Now, if you turn to Exhibit 10, which is a  
25 cash flow projection, next to the last line on the

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1 left, available line of credit. Let me just --  
2 strike that.

3 When was Exhibit 10 shown to the bank, if  
4 at all?

5 MS. JOYCE: By her?

6 MR. GEBHARDT: Objection.

7 BY MR. SWICHAR:

8 Q Do you know if Exhibit 10 was ever given to  
9 the bank?

10 A I don't recall actually handing it to them,  
11 no.

12 Q Do you recall when this document was  
13 prepared?

14 A Yes, I do.

15 Q When was that?

16 A Printed as of February 16th. It was  
17 probably prepared prior to that.

18 Q Now --

19 A And again, I prepared these on a regular  
20 basis.

21 Q Now, going down to the available line of  
22 credit, do you see that on the left, line of credit?

23 A Yes.

24 Q Am I correct that it reflects that the line  
25 of credit as of February was \$5.2 million, correct?

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1 A Yes, that's correct.

2 Q And am I correct that if we then go into  
3 March, we see that the line of credit was reduced by  
4 the 1.2 million, i.e., to 4 million; is that correct?

5 A That's correct.

6 MR. SWICHAR: If I could have a minute with  
7 my client, that may be my last question. If I may  
8 just ask one more question.

9 BY MR. SWICHAR:

10 Q I want to get back to the situation where  
11 the bank froze CCI's account. Were there situations  
12 where the bank had clear checks of CCI but then  
13 reversed those clearings?

14 A Yes, there were.

15 Q Tell me what that is about.

16 A We had -- in my computer system, I had a  
17 tie-in to Allfirst that would show the activity in  
18 our accounts. I could see what was going through  
19 there on a daily basis.

20 I had seen the checks that had cleared, and  
21 we started seeing -- I could see it on our reports  
22 that it was taken out of our account as a clear  
23 check, and then I started seeing it going back as  
24 though it didn't clear.

25 I started seeing those reports. I said,

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1 they're going back in time. If I recall correctly --  
2 as I said, I think Wednesday is when I had found out  
3 the accounts were frozen. I think they went back as  
4 far as Monday and uncleared checks that had shown as  
5 clear on our account.

6 Q Do you recall those payees?

7 MS. JOYCE: Of which the checks were  
8 reversed you mean?

9 MR. SWICHAR: Yeah.

10 THE WITNESS: Again, it was any check that  
11 we had written. It was employees. It was vendors.  
12 It was subcontractors. It was utility payments.

13 Q Do you recall if one check was to the IRS?

14 A I recall several checks that had to do with  
15 payroll-type issues. I don't if it was IRS. I think  
16 there was unemployment. I don't remember exactly  
17 what it was, but there were payroll-type of issues.

18 It could have been the IRS. In fact, as  
19 I'm speaking about it, Wednesday usually was the day  
20 that we did that through a funds transfer. So that  
21 probably was one.

22 Q An IRS check?

23 A Yes.

24 Q How about Cleveland Brothers? Was that  
25 another check that was honored and then reversed?